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August 28, 1998

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VIA FEDERAL EXPRESS

Ms. Magalie Roman Salas
Secretary
F.C.C.
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Heidi Damsky, MM Docket No. 90-638, Homewood, Alabama,
FM Proceeding

Dear Ms. Salas:

I am in receipt of a letter from Stephen Diaz Gavin, counsel for Homewood Radio Co., L.L.C. ("HRC"), in which he seeks expedited action on an application by HRC for modification of construction permit.

The Commission is familiar with this matter. On August 3, 1998, the staff issued a construction permit to HRC for a new FM broadcast station at Homewood, Alabama. That action was taken notwithstanding the pendency of a Petition for Reconsideration and Motion for Stay, filed by my client, Heidi Damsky ("Damsky"). Thereafter, Damsky filed an Application for Review of the staff's action issuing the construction permit. Contrary to HRC's contentions, it has been long-standing policy for the staff to defer the issuance of construction permits in contested proceedings until after all administrative appeals have been exhausted. Notwithstanding an apparently exhaustive search, HRC has not been able to produce a single case to the contrary. Orion Communications, Ltd. v. F.C.C., 131 F.3d 176 (D.C. Cir. 1997), is not such a case. The Commission did not issue a construction permit in Orion until it had thrice confirmed its original grant to Orion and appeals had been taken in the courts. What the court actually said is this:

"In 1990, after a contested hearing, an Administrative Law Judge granted the application of Orion Communications, Ltd., for a license

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to operate a new FM station in Biltmore Forest, North Carolina. See National Communications Indust., 5 FCC Rcd 2862 (ALJ 1990). The Federal Communications Commission thrice confirmed that grant. See National Communications Indust., 6 FCC Rcd 1978 (Rev. Bd. 1991); National Communications Indust., 7 FCC Rcd 1703 (1992) (denying applications for review); Liberty Prod., 7 FCC Rcd 7581 (1992) (denying petition for reconsideration). In April 1993, while rejected applicants had still further appeals pending before the Commission and this court, the FCC issued to Orion a construction permit 'conditioned on the final outcome of Docket 88-577, ' i.e., the license proceeding, noting that '[a]ny construction pursuant to this permit prior to this docket becoming final is at the permittee's sole risk.'" 131 F. 3d 176 at p. 177.

The FM rule making case at Germantown, Tennessee, cited in footnote 1 of Mr. Gavin's letter, is also not such a case. See Amendment of FM Table of Allotments (Germantown, Tennessee), 7 FCC Rcd 3940 (MMB 1992). That is simply a case in which the Allocations Bureau responded to a petition for rule making filed by Omni Broadcasting, Inc., which apparently styled itself as the "permittee" of Channel 298A, Germantown, Tennessee, by issuing a notice of proposed rule making looking towards the substitution of Channel 298C3 for Channel 298A at Germantown. There is no evidence of record to show whether the construction permit had actually been issued in that case or not. The action of the Chief, Allocations Bureau, referring to Omni as a "permittee" proves absolutely nothing.

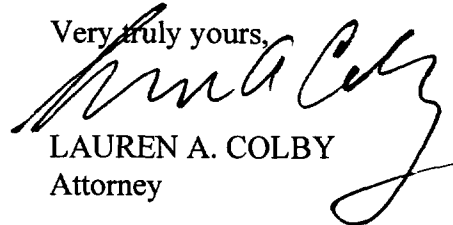
Now, as HRC points out, the Commission has denied Damsky's petition for reconsideration and motion for stay, and Damsky will, of course, enter a timely appeal with the U.S. Court of Appeals for the D.C. Circuit. To request a stay from the Court of Appeals, however, Damsky must first file a request with this Commission for a stay, *pendente lite*, that is required by the courts rules.

Damsky has 30 days in which to notice an appeal and file a motion for stay, *pendente lite*. For the Commission to issue any construction permit until Damsky has had an opportunity to notice an appeal and file her motion for stay, *pendente lite*, violates long-standing policy. Therefore, Damsky opposes the relief requested in HRC's letter of August 25, 1998. It would be deeply prejudicial to Damsky and would deprive Damsky of due process of law, if the Commission were to issue any construction permit before it has an opportunity to act on the motion she is entitled to

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file and required to file by court rules, seeking a stay, *pendente lite*.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lauren A. Colby', written over the typed name and title.

LAUREN A. COLBY
Attorney

LAC/tdm

Enclosure

cc: Ms. Linda Blair (Fax/Mail)
Mr. James Shook (Fax/Mail)
Stephen Diaz Gavin, Esq.
John F. Garziglia, Esq.
Mrs. Heidi Damsky
Mr. Brad Deutsch (Fax/Mail)
John I. Riffer, Esq. (Fax/Mail)
Mr. James R. Crutchfield